No. 1154

In the Supreme Court of the United States

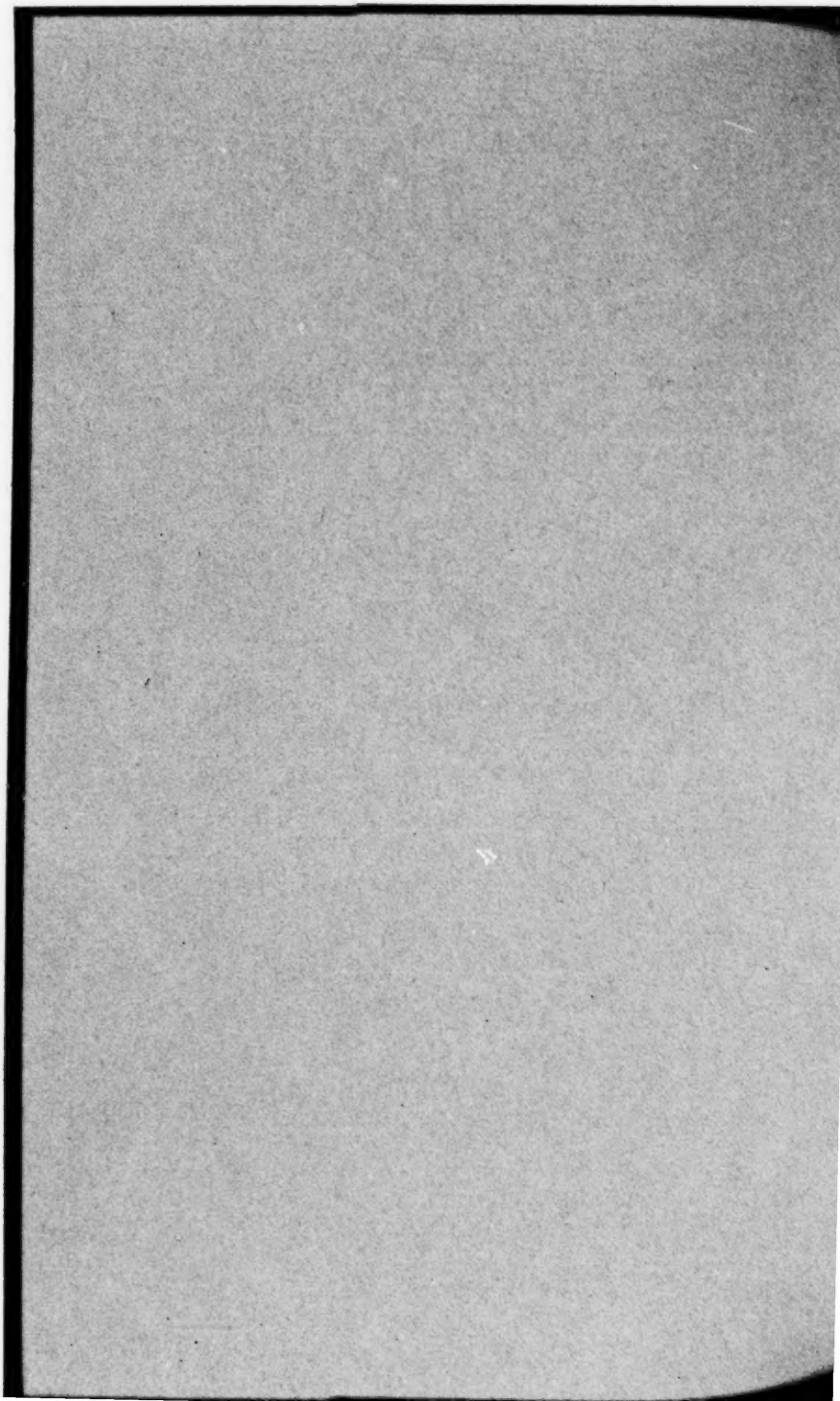
OCTOBER TERM, 1946

UNITED STATES OF AMERICA, PETITIONER

v.

MODERN REED AND RATTAN COMPANY, INC., AND ACHILLE GIANNASCA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT



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The Acting Solicitor General on behalf of the United States prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered January 8, 1947, reversing the convictions of respondents for violations of the Fair Labor Standards Act.

OPINION BELOW

The opinion of the circuit court of appeals (R. 442–445) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered January 8, 1947 (R. 445–446). A

petition for rehearing (R. 446–447) was denied January 24, 1947 (R. 448). On February 24, 1947, by order of Mr. Justice Jackson, the Government's time to file a petition for a writ of certiorari was extended to March 26, 1947 (R. 449). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTION PRESENTED

The Fair Labor Standards Act provides that violators may be imprisoned only after a prior conviction under the Act. The question presented is whether, on the trial of a second offender under the Fair Labor Standards Act, it was error to put before the jury the fact of the prior conviction and sentence for violation of the Act.

STATUTE INVOLVED

Sections 15 and 16 of the Fair Labor Standards Act of June 25, 1938, c. 676, 52 Stat. 1060, 1068 (29 U. S. C. 215, 216), provide in pertinent part as follows:

> SEC. 15. (a):
> * * * it shall be unlawful for any person—
> (1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in com-

merce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; * * *

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

* * * * *

(5) to violate any of the provisions of section 11 (c), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

* * * * *

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

* * * * *

STATEMENT

Respondents were convicted on 28 counts of an information returned against them in the United

States District Court for the Southern District of New York, charging violations of the Fair Labor Standards Act in that they (1) wilfully failed to pay time and one-half overtime wages to employees engaged in the manufacture of furniture to be shipped in interstate commerce, (2) wilfully shipped in interstate commerce furniture on which the employees thus denied overtime pay had worked, and (3) falsified records with respect to payment of wages to such employees (R. 5–42, 401–402). The corporation was fined $50 on each count, and the individual respondent was sentenced to imprisonment for three months and to pay a fine of $50 on each count, the prison sentences to run concurrently (R. 409).

The descriptive portion of the first count, which was incorporated by reference in the other counts, contained an allegation that respondents had pleaded guilty and had been sentenced under an information filed against them in 1941 charging failure to pay minimum statutory wages, shipment in interstate commerce of goods produced by employees not compensated in accordance with the requirements of the Act, and falsification of records (R. 7–8). In his opening statement, the United States Attorney stated that, as the trial judge had already told the jury, it was essential to the Government's case to prove the prior conviction, and that since this fact was a matter of official record, he did not believe there would be any dispute about it (R. 48). Defense counsel

did not object to this statement and himself referred to the prior conviction in his opening statement (R. 50). At the trial, the Government introduced the prior judgments of conviction without objection by defense counsel (Gov. Exs. 1 and 2, R. 53, 411–412). At the close of the evidence, the defense requested the court to instruct the jury to disregard the evidence of the prior offense in determining guilt or innocence (R. 386); the court accordingly instructed the jury as follows (R. 394):

> On the question of prior conviction of the defendant Giannasco and, I think, of the corporation, I charge you that in determining the fundamental issue of guilt or innocence in this case, you are not to put any weight upon that conviction. In determining the guilt or innocence of the defendants in this case you are not to say "He was convicted before, we will ignore the proof, he ought to be convicted now." You must rule it out when you are considering the fundamental issues in this case of whether or not the statute was wilfully and consciously and intentionally violated by these defendants.

On appeal, respondents for the first time contended that the references to their prior convictions at the trial below constituted prejudicial error. The circuit court of appeals upheld this contention and reversed the convictions (R. 443–445).

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

(1) In holding that, at a trial for a second offense under the Fair Labor Standards Act, it is error to bring before the jury the fact of the prior conviction.[1]

(2) In reversing the judgments of conviction.

REASONS FOR GRANTING THE WRIT

1. Until the decision of the court below, it has been considered an established rule that, where a statute provides greater punishment for a second offense, the indictment or information must allege the prior conviction, and the allegation must be supported by proof at the trial, unless a different mode of procedure is specifically prescribed by

[1] If certiorari is granted, the Government reserves the right, if so advised, to renew the contention urged in the circuit court of appeals that even if there was error a reversal should not have been directed under the circumstances of this case (see Statement, *supra*). Notwithstanding that objection was not made to the references in the information and at the trial to the prior convictions or to the proof thereof, that the jury was instructed not to consider the prior convictions on the question of guilt, and that the circuit court of appeals assumed that the Government could have proved Giannasca's prior conviction either to rebut evidence of his good character or to discredit him as a witness, the circuit court of appeals nevertheless held that the error was not waived and was substantial (R. 444–445). The court does not refer to the fact that Giannasca may have been forced to take the stand to escape conviction in view of De Pietro's testimony (see R. 443) rather than, as it suggested, because his freedom of choice had been taken away by the references to and the proof of his prior conviction.

statute. The text writers so state the rule;[2] this Court has given it recognition in dealing with problems arising out of state habitual criminal statutes;[3] numerous circuit courts of appeals so held in prosecutions arising under Title II, Section 29, of the National Prohibition Act (41 Stat. 316);[4] and many State decisions are to the same effect.[5] In fact, the rule was considered so well settled that in *Graham* v. *West Virginia,* 224 U. S. 616, this Court found it necessary to consider the propriety of a statute providing for a different method of proof of the prior offense. This Court there referred to the "familiar practice to set forth the fact of prior conviction of another offense, and to submit to the jury the evidence upon that issue together with that relating to the commission of the crime which the indictment charges." 224 U. S. at 625.

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[2] Bishop, *Criminal Law*, 9th ed., Vol. I, § 961; Wharton, *Criminal Law*, 7th ed., Vol. III, § 3417.

[3] *McDonald* v. *Massachusetts*, 180 U. S. 311, 313; *Graham* v. *West Virginia*, 224 U. S. 616, 625–626.

[4] *Jacobs* v. *United States*, 24 F. 2d 890, 891 (App. D. C.); *Klein* v. *United States*, 14 F. 2d 35, 36 (C. C. A. 1); *Singer* v. *United States*, 278 Fed. 415, 420 (C. C. A. 3), certiorari denied, 258 U. S. 620; *Doerning* v. *United States*, 49 F. 2d 44, 45 (C. C. A. 6); *McCarren* v. *United States*, 8 F. 2d 113, 114 C. C. A. 7); *Massey* v. *United States*, 281 Fed. 293, 297 (C. C. A. 8); *Smith* v. *United States*, 41 F. 2d 215, 216 (C. C. A. 9), certiorari denied, 282 U. S. 876.

[5] A number of the State decisions are cited in *Massey* v. *United States, supra;* see also cases collected in 58 A. L. R. 64, and 82 A. L. R. 366.

The decision below distinguishes the prohibition cases on the ground that Section 29 of the National Prohibition Act and its successors specifically provided that the prior conviction be pleaded in the indictment or information,[6] whereas the statute presently involved contains no such requirement. This difference between the two statutes would not seem to offer a sound basis for distinction. A defendant who is charged with being a second offender ought to be informed of that fact, whether the statute so provides or not, in order that he may be able to contest the fact of a prior conviction. See *McDonald* v. *Massachusetts,* 180 U. S. 311, 313, where this Court said: "The allegation of previous convictions is not a distinct charge of crimes, but is necessary to bring the case within the statute * * *." And if the fact that a defendant must be informed of the prior conviction requires proof of such fact at the trial, as the Prohibition Act cases hold, then the same reasoning would require proof of the allegation of prior conviction in a case such as this. The Government does not at the outset know whether the defendant will or will not contest the fact of prior conviction. The decision below thus presents, we believe, a direct conflict with the

[6] Section 29 of the National Prohibition Act, 41 Stat. 316, read in pertinent part as follows:

"* * * It shall be the duty of the prosecuting officer to ascertain whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment. * * *"

cases arising under the Prohibition Act cited in footnote 4, *supra.*

2. Considered *de novo,* as a matter of principle it may be desirable that a procedure be established whereby evidence of a prior conviction would not be presented to the jury. But, in view of the long line of decisions holding that a defendant has a right to have a jury pass upon the question of second offense, it is imperative that the question be determined by an authoritative decision of this Court. In the present posture of the law, the Government is faced with a dilemma in prosecuting second offenders, not only under the Fair Labor Standards Act, but under the Federal Food, Drug, and Cosmetic Act as well, for Section 303 of the latter act (21 U. S. C. 333 (a)) also provides for increased punishment of second offenders without specifying the mode of procedure. If the Government fails to allege and prove the prior offense, then, under the cases heretofore cited, it runs the risk of being unable to invoke the penalty provided for a second offender. See *United States* v. *Berkowitz,* 45 F. Supp. 564 (W. D. Mo.), where the court refused to sentence the defendant as a second offender under the Fair Labor Standards Act because the prior conviction was not alleged in the information.[7] If it does allege and

[7] In a recent decision of the Fifth Circuit, *Cartwright* v. *United States,* 146 F. 2d 133, 135, that court said, in the course of a discussion of another problem, "Similarly, where a statute, such as the National Prohibition Act, Title 2, Sec. 29,

prove the prior offense, then, if the decision below is correct, no action by the trial judge in limiting the effect of such evidence can save the trial from error. In view of the fact that the Fair Labor Standards Act has been in effect for eight years and the Food and Drug Act for more than forty years, the problem of second offenders is obviously one of importance, and the procedure to be followed in such cases ought to be definitively established by this Court.

CONCLUSION

Since the procedure on the trial of second offenders required by the decision below is contrary to the rule recognized by this Court and adopted by other circuit courts of appeals, and since the question is one of general importance, we respectfully submit that this petition for a writ of certiorari should be granted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

MARCH 1947.

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27 U. S. C. A. § 46, provides for more severe punishment for subsequent offenses than for a first offense, the fact of the prior offense must be positively alleged and proved."

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FILE COPY

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RESPONDENTS' BRIEF

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RESPONDENTS' BRIEF

Opinion Below

The opinion of the Circuit Court of Appeals (R. 442-445) has not yet been reported.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

In a prosecution for a second offense under Section 16(a) of the Fair Labor Standards Act, is a prior offense an ingredient of the second offense so as to require that it be pleaded in the information and proved at the trial?

Statute Involved

Section 16(a) of the Fair Labor Standards Act of June 25, 1938, c. 676, 52 Stat. 1060, 1608 (29 U. S. C. 216), reads as follows:

> "Sec. 16(a). Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection."

Statement

Respondents were convicted in the United States District Court for the Southern District of New York on May 13, 1946 after trial before a jury upon an information charging them with violations of Section 15 of the Fair Labor Standards Act (R. 43). On May 29, 1946, the Court imposed a sentence of three months' imprisonment and a fine of $1300 upon respondent Giannasca, and a fine of $1300 upon respondent corporation (R. 409). The information contained 32 counts, each of which alleged that on November 11, 1941, in the Southern District of New York, respondents pleaded guilty to violations of the Fair Labor Standards Act and were sentenced to pay fines, and that respondent Giannasca was placed on probation for a year (R. 5-42).

In his opening to the jury, the United States Attorney informed the jury that respondents had pleaded guilty on a prior occasion to an information charging violations of a similar nature to those for which they were then on trial (R. 48). As the Government's first two exhibits at the trial, there were offered and received in evidence the judgments of the United States District Court for the Southern District of New York of the prior convictions of respondents, showing the fines imposed upon them and the probation term imposed upon respondent Giannasca (R. 411-412).

Respondents appealed from the judgments of conviction to the Circuit Court of Appeals for the Second Circuit (R. 436) which reversed the judgment on the ground that the prior convictions had been improperly admitted in evidence and remanded the cause for a new trial (R. 445).

Argument

A defendant in a criminal trial is entitled to be tried only for the offenses with which he is charged, and may not be tried for other offenses (*Boyd* v. *U. S.*, 142 U. S. 450).

Under Section 16(a) of the Fair Labor Standards Act, there is no warrant or requirement that a prior conviction of the defendant be pleaded or proved in a prosecution for a second offense. That section defines a single crime. It does not define a different or more grievous crime for a second offense. Section 16(a) of the Act prescribes the penal sanctions for violations of the Act in its first sentence. It nowhere prescribes greater penal sanctions for a second violation of the Act.

It is undoubtedly the law that a statute which specifies one penalty for a first offense and a mandatorily severer penalty for a second offense defines two different offenses. The first offense under such a statute is an ingredient of the second offense and must be pleaded and proved in the

prosecution for a such second offense if the more severe penalties for the second offense are sought to be applied.

Examples of such statutes are the National Prohibition Act and the Baumes Law of the State of New York. Under the National Prohibition Act it was provided that "Any person violating the provisions of any permit * * * or violates any of the provisions of this chapter * * * shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years. It shall be the duty of the prosecuting officer to ascertain whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment." Appellee argues by analogy to this statute that a prior conviction is an essential ingredient of the second offense and must be pleaded and proved in a prosecution for a second offense.

Under the National Prohibition Act, three different offenses were defined by statute and different penalties were imposed for each. A first offense carried a fine of not more than $500, a second offense, a fine of not less than $100 and imprisonment for not more than ninety days, any subsequent offense, a fine of not less than $500 and imprisonment for not less than three months. Congress decreed that a second offense was of greater gravamen than a first offense, and a subsequent offense more grievous than a second offense. Similarly, the Baumes Law of the State of New York prescribes greater punishments for crimes if the criminal has before been convicted of a felony or felonies. (Section 1941, Penal Law, McKinney's Consolidated Laws of New York, Annotated, p. 425.) Examples of the application of the rule requiring pleading and proof of a first or second offense under the National Prohibition Act upon a prosecution for subsequent offenses are con-

tained in the cases cited at page 7 of the petition. Each of these cases justifies the pleading and proof of the prior offense by reference to the mandate of the statute and the definition therein of different offenses depending upon whether or not the defendant has been convicted of a first, second or subsequent offense.

The application of second offenders acts, such as the Baumes Act, is demonstrated in *Graham* v. *West Virginia*, 224 U. S. 616, cited by petitioner. There, the defendant was arraigned upon an information reciting that he had previously been convicted of a felony, and had thus incurred the severer penalties imposed upon second offenders. This Court held that the defendant suffered no deprivation of any constitutional right by reason his being more severely punished as a second offender. The case has no application to the instant question since the instant statute does not prescribe severer penalties for a second than for a first offense.

The rule applicable to cases in which a second or subsequent offense carries heavier punishment is stated as follows:

> "If the offence is the second or third and by reason thereof the punishment is to be made heavier, this fact must appear in the indictment. * * * Still there is no reason why the law should not, as in some localities it does, permit this matter to be withheld from the jury or even omitted from the indictment until the prisoner has been convicted of the offence itself. * * * A course like this is specifically fair to the prisoner as preventing a prejudice against him by the jury from the former conviction which is not legal evidence." (Bishop, Criminal Law, 9th Ed., Vol. 1, § 961.)

While recognizing the practice of pleading and proving a prior conviction upon the prosecution of a second offender where the statute prescribes greater penalties for second offenses, Wharton disapproves of the policy as invading a

well-settled safeguard of justice that the defendant is to be tried "not for being generally bad, but only for the one particular bad act." (Wharton's Criminal Law, 7th Edition, Vol. 3, Sec. 3418.)

A statute providing for severer punishment on conviction for second offense is highly penal and must be strictly construed. (*U. S.* v. *Lindquist*, W. D. N. D. 1921, 285 Fed. 447, 448.) Those statutes prescribing mandatorily severer penalties for second offenses must be distinguished from the instant statute, which prescribes a single penalty whether the offense be a first, second or subsequent offense. The second sentence of Section 16(a) of the Act reading "No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection" is read by the petitioner as if it mandatorily prescribed a greater penalty for a second or subsequent offense than for a first offense. The statute cannot be so read. The second sentence of Section 16(a) is a mere restriction upon the Court's power to punish a first offense against the Act. The quoted second sentence of the Act does not create a more grievous offense with greater mandatory penalties and has no relevancy whatever to the definition of any offense. The restriction contained in the quoted sentence is exactly analogous to the restrictions frequently imposed upon the power of a Court to send a minor offender to a state prison. This restriction upon the power of the Court does not mean that the offense of which the minor has been convicted is a different offense from that for which an adult might have been convicted, but has reference only to the power of the Court to dispose of a defendant after he has been convicted.

An instance of the restriction upon the power of the Court to punish minors is contained in Section 2194 of the Penal Law of the State of New York (McKinney's Con-

solidated Laws of New York, Annotated, p. 626), reading in part as follows:

> "A child under sixteen years of age committed for misdemeanor, under any provisions of this chapter, must be committed to some reformatory, charitable or other institution authorized by law to receive and take charge of minors."

It cannot logically be argued that there is any difference in the crime of a child under sixteen years of age because there is a restriction upon the manner of his punishment. It cannot with any greater logic be argued that a first offense under the Fair Labor Standards Act is any different from a second offense because there is a restriction upon the manner of the punishment of the first offense. The Fair Labor Standards Act defines only a single offense and nowhere attributes greater gravamen to a second offense than to a first. The same penalty is prescribed for either. There is no requirement that the Court impose any more severe penalty upon a second offender than upon a first offender. This has been left by the Act to the discretion of the Court and is of no concern to the jury.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP S. AGAR,
Counsel for Respondents.